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No. 92-906

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BONNIE MOORE, ACCOUNTING CENTER, and
CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,
Petitioners,

VS.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners

and

BRIEF OF AMICUS CURIAE

In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

In Support of Bonnie Moore, Accounting Center, and California Association of Independent Accounts, Petitioners.

Motion is hereby made to this Court for leave to file a brief in this case as an amicus curiae. Consent of petitioners herein has been obtained, but the respondent, California State Board of Accountancy, has refused to consent.

California Society of Enrolled Agents has an interest in this case in that it is a professional society of California Enrolled Agents licensed by the Internal Revenue Service with authority to practice before it. In the course of their practice before the Service, Enrolled Agents perform accounting services for their clients as an integral part of preparing documents such as tax returns.

Most members of the California Society of Enrolled Agents are not licensed by the California State Board of Accountancy as either Certified Public Accountants or Public Accountants. The

State Board has in the past issued cease and desist letters to Enrolled Agents who employ the terms "accounting," "accountant," and "accounting services" in their advertising. As a result, Enrolled Agents who do business in California have a direct interest in this case because the State Board may, at any time, attempt to enforce the California Supreme Court's prohibition on the use of the terms "accounting," "accountant," and "accounting services" by Enrolled Agents to describe to the public the services they lawfully perform.

The purpose of the brief of amicus is to bring three relevant points to the attention of this Court:

1. Petitioners have pointed out that the California Supreme Court's mandatory disclaimer would mislead, rather than inform, the public. Amicus would point out also that the disclaimer, in reality, imposes an absolute prohibition of the use by unlicensed accountants of the generic terms, "accounting," "accountant," and "accounting services." That is so because the California Supreme Court requires any use of those terms to be accompanied by language which is both misleading and demeaning. No reasonable person would pay that price for the "freedom" to use the generic terms which most accurately describe his or her work. Consistent with the decisions of this Court, the California Supreme Court itself conceded those terms could not be absolutely prohibited because they were truthful and relevant within the purview of this Court's decisions in *Virginia Pharmacy Board v. Virginia Consumer Council* (1975) 425 U.S. 748 and its progeny. Yet that is precisely what the California Supreme Court did with the mandatory disclaimer it imposed *sua sponte*.

2. Petitioners have pointed out that the California Supreme Court's unilateral adoption of the mandatory disclaimer has denied the petitioners due process because petitioners were denied the opportunity to present an argument as to the propriety of the disclaimer or its content at any stage of the litigation here. Amicus would address in addition the potential impact of the California Supreme Court's unaccountable process of sanctioning a court-fashioned mandatory disclaimer which amounts to amendment of the State Board's regulation here at issue. In so doing, the California Court ignored and circumvented this Court's

mandate that any State must meet a heavy burden when it attempts to regulate speech which is truthful and relevant: the State must not only demonstrate its interest in regulating that speech but must also demonstrate its regulation is proportional to that interest. (*Peel v. Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 109; *In re R.M.J.* (1982) 455 U.S. 191.) The California Court circumvents this mandate by concocting a compulsory disclaimer without any reference to the State's burden and without reversing the trial court's decision for further proceedings below by the California Legislature or the State Board.

3. Petitioners discuss the impact of the California Supreme Court's decision on unlicensed accountants in general. The amicus would show the specific impact on federally licensed Enrolled Agents who practice in the State of California.

The facts and questions of law set forth above are relevant to the disposition of the case because the critical issue in this case is the extent to which the California Supreme Court's decision, both procedurally and substantively, undermines the doctrine of commercial free speech as applied to speech which is truthful and relevant. That the California Court has, in reality, imposed an absolute prohibition on such speech despite this Court's consistent decisions otherwise is highly relevant to the disposition in this case. In addition, this Court should carefully scrutinize the summary process by which the California Supreme Court circumvented the necessity of a State to meet a heavy burden when it seeks to regulate speech which is truthful and relevant and *sua sponte* fashioned its own mandatory disclaimer.

It is also relevant for this Court to know the extent of the impact of this decision on accounting practitioners who are federally licensed but who are not licensed in California as well as the potential impact upon all nonlicensed professionals.

As documented above, the brief of amicus will bring additional relevant matters to this Court's attention. Therefore, we urge this Court to grant this motion for leave to file the amicus brief.

Dated:

Respectfully submitted,

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California Society of Enrolled Agents

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INTEREST OF THE AMICUS CURIAE

By leave of this Court, California Society of Enrolled Agents, a California nonprofit mutual benefit corporation, files this brief as amicus curiae.

The California Society of Enrolled Agents is a nonprofit professional association incorporated in the State of California. Its membership consists of 3,500 individuals who practice in California. Enrolled Agents are those persons who are enrolled with the Internal Revenue Service such that they are entitled to practice before the Service. (See 31 C.F.R. § 10.2(a).) In the course of this practice, Enrolled Agents perform various accounting services for clients, including posting financial transactions, preparing general ledgers, and preparing financial statements.

California Enrolled Agents are not licensed by the California State Board of Accountancy as either Certified Public Accountants or Public Accountants. In the past, the State Board has issued cease and desist letters against Enrolled Agents who advertise their services by using the terms "accountant," "accounting," or "accounting services."

California Enrolled Agents admittedly perform lawful accounting services but are fearful of advertising that fact in light of the decision of the California Supreme Court. As a result, Enrolled Agents and their professional society, California Society of Enrolled Agents, have a very real interest in this case.

SUMMARY OF ARGUMENT

This case involves a not-so-subtle perversion of the doctrine of commercial free speech in direct violation of *Virginia Pharmacy Board v. Virginia Consumer Council* (1975) 425 U.S. 748 and its progeny. The California Supreme Court conceded that the California State Board of Accountancy could not impose an absolute prohibition on the use of the terms "accountant," "accounting," and "accounting services" because those terms were factually accurate in that California specifically permits unlicensed practitioners to prepare financial reports and perform other basic accounting services. Despite this concession, the Court failed to reverse the trial court's decision which upheld the State Board's ban on the use of the terms without qualification. Instead, the California Supreme Court affirmed the decision of the intermediate court in which that court had concocted a mandatory disclaimer which required unlicensed practitioners, whenever they attempted to advertise accounting services, to also warn the public they were not licensed or the services they offered did not require a license.

By this disclaimer or warning, the California Supreme Court, in reality, imposed an absolute prohibition on the use of the terms "accountant," "accounting," and "accounting services" which prohibition it had already conceded was improper; no reasonable accounting practitioner would advertise accounting services in the way the disclaimer or warning would require.

This Court on numerous occasions has held that a State must meet a heavy burden when it would seek to regulate commercial speech which is truthful and relevant. In this case, the California Supreme Court has ignored that burden.

The California Supreme Court's unusual manner of proceeding resulted in the fact that it completely bypassed the normal way in which courts deal with constitutional challenges to State regulations. Instead of declaring the State Board's regulation to be invalid and reversing the decision of the trial court that had upheld it, the California Court simply rewrote the regulation. By so doing, the Court bypassed entirely the California Administrative Procedure Act (Cal. Govt. Code § 11340 et seq.) which requires regulatory agencies, among other things, to assess alternatives to proposed regulations in terms of effectiveness and their burden on persons who would be affected by the proposed regulations. Had the Court followed that process, it would have acted in consonance with this Court's holding in *In re R.M.J.* (1982) 455 U.S. 191 that restrictions on speech must be narrowly drawn and the State lawfully may regulate it only to the extent the regulation furthers the State's substantial interest.

As a result, the California Supreme Court has managed to itself amend a State regulation so as to impose an absolute prohibition on truthful and relevant commercial speech. At the same time, it has prevented both Petitioners and the State Board of Accountancy from participating in any meaningful way in the process of amending the regulation. The impact on the public here is great because the public is denied access to truthful and relevant information concerning the availability of accounting services in California. By subverting this Court's doctrine of commercial free speech through its adoption of a court-fashioned warning, the California Court has insulated its own amendment to the State Board's regulation from constitutional challenge.

This is a proper case for this Court to hear because the California Supreme Court's approach to the doctrine of commercial free speech cuts the heart out of the doctrine as applied to the right to disseminate truthful and relevant speech. The Court should act now to disapprove firmly of the California Supreme

Court's approach so other jurisdictions will be unmistakably advised such an approach is improper.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION THREATENS TO EVISCERATE THIS COURT'S DOCTRINE OF COMMERCIAL FREE SPEECH AS APPLIED TO THE USE OF TRUTHFUL AND RELEVANT SPEECH.

This case involves highly important principles of commercial free speech. In particular, the California State Board of Accountancy sought to enforce against Petitioners here its own regulation which reads as follows:

> The following are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of section 5058 of the Business and Professions Code: (a) 'Accountant,' 'auditor,' 'accounting,' or 'auditing' when used either singularly or collectively or in conjunction with other titles. (b) Any other titles or designations which imply that the individual is engaged in the practice of public accountancy.

(Cal. Admin. Code, tit. 16, ch. 1, art. 1, reg. 2.)

The State Board asserted that the Petitioners here had violated the regulation because they were unlicensed and had employed the terms "accountant" and "accounting" (sometimes hereinafter referred to as "accounting" terms) in advertising their services. The petitioners maintained the terms "accountant" and "accounting" were generic, not false and misleading, and therefore protected by the First Amendment.

In its decision the California Supreme Court recognized, consistent with the First Amendment and decisions of this Court, the terms "accountant" and "accounting" could not be completely suppressed because petitioners were lawfully entitled to perform accounting services. However, the Court continued:

> As the rulings by the United States Supreme Court . . . make clear, in order to satisfy the First Amendment, appellants must be permitted to use the terms 'accountant,' 'accounting,' or 'accounting services,' if the use of those terms is further qualified by an explanation, disclaimer or warning stating that the advertiser is not licensed by the state, or that the services being offered do not require a state license, thereby eliminating any potential or likelihood of confusion regarding those terms.

(*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1023.)

The Court thus contrived its own mandatory disclaimer requiring an unlicensed accountant to state either that she is "not licensed by the state, or that the services being offered do not require a state license." The California Supreme Court's only explanation for its mandatory disclaimer was that it would eliminate "any potential or likelihood of confusion regarding the terms 'accountant,' 'accounting,' or 'accounting services.' " But, precisely the opposite would be true. The mandatory disclaimer is equivalent to this warning: "Buyer beware. You run a risk in hiring this accountant because she is not licensed and because you may require accounting services that require a license."

In reality, then, the disclaimer is so negative that no unlicensed accountant would incorporate it in any advertising designed to advise clients that lawful accounting services are being offered. Thus, the California Supreme Court, by inventing the disclaimer, has imposed an *absolute prohibition* of the use of the "accounting" terms.

Although the California Court gave lip service to this Court's holdings that the State could not absolutely prohibit the dissemination of accurate, factual information, the Court ignored this Court's decisions concerning the authority of the State to regulate this form of speech. This Court plainly and succinctly stated the controlling principle here when it said:

> The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that *disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information.* (citations) Even if we assume that Petitioner's letterhead may be potentially misleading to some consumers, that potential does not justify the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.

(*Peel v. Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 109; emphasis added.)

This Court has previously described the State's burden:

> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. (Citations.) Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.

(*In re R.M.J.* (1982) 455 U.S. 191, 203.)

Here, the California Supreme Court not only issued a categorical prohibition against the dissemination of accurate or factual information to the public, it also failed completely to acknowledge this Court's requirement which applies when the State seeks to regulate such speech: the State must meet a heavy burden demonstrating a substantial interest in regulating the speech and that any interference with that speech will be in proportion to the State interest served. Instead, the California Supreme Court failed even to mention the State's burden and concocted its own disclaimer. The California Court's failure to identify any State

interest and further failure to consider any alternatives to its onerous mandatory disclaimer thus falls short of this Court's decisions in *Peel* and *In re R.M.J.* Surely, this Court had in mind that a State would follow the recognized customary procedure for amendment of regulations when it attempted to salvage regulations which did not meet First Amendment standards.

As is the case in other states, regulations in California are not amended by courts but by regulatory agencies. These agencies must follow deliberate processes which provide for substantial input by interested parties before any amendment is finally adopted. Thus, the California Administrative Procedure Act (Cal. Govt. Code § 11340 et seq.) requires, among other things, notice by the regulatory agency of proposed amendment of a regulation (§ 11346.4), assessment by the agency of the potential for adverse economic impact on small business enterprises and individuals (§ 11346.53), *[a] description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives, and a statement that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation*" (§ 11346.14(b); emphasis added), the opportunity for public comment (§ 11346.5(a)(9)), and the right to a public hearing (§ 11346.5(a)(11)).

California's statutory scheme for amending regulations is consistent with this Court's mandate that a State must first identify its interest and then fashion a regulation accordingly whenever the State attempts to regulate speech that provides accurate, factual information. But the California Supreme Court has not only ignored the basic substantive and procedural requirements for amendment of regulations, it has failed to follow any process at all in fashioning *sua sponte* its disclaimer.

The California Supreme Court's manner of proceeding here would effectively emasculate this Court's doctrine of commercial free speech when applied to accurate, factual speech. The California Court takes advantage of this Court's statements to the effect that the State may regulate accurate, factual speech. The Court ignores this Court's restrictions on the State's ability to regulate

because the California Court does not at all take into account the State's burden to demonstrate both its interest in regulating the speech in question and that it has adopted a regulation in proportion to that interest. Instead, it fashions its own disclaimer which serves as a complete suppression of the speech in question. In so doing, it eschews the normal course when a Court finds a regulation to be unconstitutional and does not reverse the decision of the lower court. By these means, the California Court has effectively foreclosed the petitioners from asserting their rights to engage in the process of determining what, if any, restriction of speech is appropriate here. Petitioners here have had no opportunity to comment upon the propriety or content of the Court's self-fashioned disclaimer. The California Court has also effectively foreclosed Petitioners from participating in a legislatively mandated process for amendment of regulations in California. The Petitioners have only one recourse: to this Court, expecting this Court will disapprove of the California Court's process and send a message to all courts that the doctrine of commercial free speech cannot be subverted in this manner.

II

THE CALIFORNIA DECISION BELOW WILL HAVE WIDE, ADVERSE IMPACT ON THE PUBLIC AND ON UNLICENSED ACCOUNTANTS.

The first and most telling real impact of the California Supreme Court's decision will be that an unlicensed accountant cannot communicate the true nature of the services she offers to the California public. As we have seen, these unlicensed accountants have been effectively foreclosed from using the "accounting" terms; they now may only advertise in terms that will distort the true nature of the accounting services they perform and desire to offer to the public. Advertising, censored in this way, will deprive the public of the benefits of competition. Because unlicensed accountants cannot advertise that they are accountants who provide accounting services, the public will be left with the untrue impression that only licensed accountants may perform accounting services.

This dilemma is illustrated by the example of the Enrolled Agent. The Enrolled Agent is licensed by the Internal Revenue Service to represent clients in all matters before the Service. The Service also regulates the Enrolled Agent in matters of advertising of services such that the Enrolled Agent may be disciplined for false or misleading advertising. (31 C.F.R., §§ 10.51(c), 10.30.)

Despite the fact that the Enrolled Agent is *federally* licensed and is regulated as to advertising by the Internal Revenue Service, the California State Board of Accountancy does not permit these Enrolled Agents who do business in California to advertise by using the "accounting" terms. (Whether the State Board has the authority to do so has not been litigated and is a question beyond the scope of this brief.) However, as the matter now stands, the decision of the California Supreme Court greatly inhibits Enrolled Agents from advertising even their federal tax accounting practices because of the continuing threat of enforcement by the California State Board of Accountancy. If Enrolled Agents cannot advertise they perform tax accounting services which are integral to the preparation of documents for submission to the Internal Revenue Service, potential clients of these Enrolled Agents are greatly disadvantaged because they are led to believe such services may only be performed by state licensed accountants.

In addition, this Court is urged to take notice of the dilemma of the Enrolled Agent who practices in more than one state. Assume an Enrolled Agent practices in a state which has no prohibition on the use of the "accounting" terms in the advertising of tax accounting services performed by an Enrolled Agent. Thus, that Enrolled Agent might employ stationery which identifies her as an Enrolled Agent/accountant. However, when that Enrolled Agent does business in California, she will be subject to the enforcement powers of the State Board of Accountancy. This Court's consideration of this case and rejection of the absolute prohibition on truthful and relevant advertising would bring uniformity of treatment of federally licensed Enrolled Agents throughout the United States.

Of course, the full impact of the California decision on the public and on all unlicensed persons throughout the United States, including Enrolled Agents, cannot be completely assessed. However, in the case at bar, no viable State interest has been offered in support of the California State Board of Accountancy's pseudo-paternalistic insistence on banning the use of the "accounting" terms in advertising by unlicensed accountants. In fact, the only sure effect of the State Board's ban (now the California Supreme Court's ban) on the use of the "accounting" terms is to reduce the competition for the provision of accounting services between two legally qualified groups and to promote the emergence of a near monopoly for one of these groups. This result has only been obtained by the California Supreme Court's perversion of this Court's doctrine of commercial free speech.

CONCLUSION

We urge this Court to grant the petition for writ of certiorari so it may reinforce the principles of the commercial free speech doctrine. This Court should deal with the decision of the California Supreme Court which grossly misapplies that doctrine so as to uphold what, in reality, is a complete suppression of the dissemination of truthful and relevant information to the public. This Court should emphatically reject the approach of the California Supreme Court which circumvents this Court's decisions and permits the State, through a State Board dominated by licensed accountants, to stifle perfectly valid competition from unlicensed persons to the detriment of the public.

Dated: December 22, 1992.

Respectfully submitted,

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